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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1225

JOSEPH H. MOSKOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 3616–3630) is as yet unreported. The District Court rendered no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 6, 1942 (R. 3631). The petition for a writ of certiorari was filed in this Court on May 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Rules, promulgated by this Court, May 7, 1934.

QUESTIONS PRESENTED

1. Whether it was error for the trial court to admit Government's Exhibit 148, which charted the computations of an accountant.

2. Whether the trial court's charge failed adequately to explain the issues involved in count two of the indictment.

3. Whether the petitioner was deprived of a fair trial because of various other instructions given or refused.

4. Whether the exclusion of testimony by an Internal Revenue Agent constituted reversible error.

5. Whether the trial court's charge on character evidence was fair and proper.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT

On June 3, 1940, petitioner and Joseph M. Schenck were jointly indicted in the Southern District of New York (R. 3). The indictment in the first three counts charged petitioner and Schenck with attempts to evade and defeat Schenck's income tax liability for the calendar years 1935, 1936 and 1937, respectively. The fourth count contained a conspiracy charge (R. 8–25). Schenck was convicted on counts one and two, relating to the years 1935 and 1936, and petitioner was convicted only on count two relating to the year 1936 (R. 1857).[1] Both defendants appealed and the convictions were affirmed by the Circuit Court of Appeals for the Second Circuit (R. 3631). Petitioner alone seeks certiorari.

Petitioner was the personal and financial business agent of Schenck, who had been long associated with the moving picture industry and who, in 1936, became chairman of the board of directors of Twentieth Century-Fox Film Corporation (R. 38). He had begun to work for Schenck in 1918 (R. 1470) and has been representing Schenck's various interests since that time (R. 1485). He was in charge of Schenck's personal records in New York (R. 315), which included a complete set of double entry books, complemented by a voucher system (R. 46, 316, 319). Another set of books

[1] Petitioner was sentenced to imprisonment for a year and a day and was fined $10,000 (R. 3350).

and records was maintained for Schenck in Los Angeles (R. 38–42), but these were treated as subsidiary to the records in New York (R. 52), and the Los Angeles bookkeepers were under the supervision of petitioner and Schenck, and submitted reports, weekly, monthly and yearly, to petitioner in New York (R. 52–53, Exs. 10–16, R. 1939–2570).

Petitioner's duties as Schenck's agent included the preparation of his income tax returns. The actual forms themselves were filled out by one Schadler, an employee of Loew's, Inc. (R. 336–337), but Schadler had no personal knowledge of Schenck's affairs and saw none of the records (R. 342), and all the information and figures, including the percentages at which claimed business expenses were to be calculated, were supplied by petitioner (R. 344).

For the year 1936 the defendants deducted from $130,000 in salaries reported by Schenck $44,676.60, which they represented as "Expenses Paid and incurred in earning salary and not reimbursed from any source" (Ex. 2, R. 1914). The vouchers and other records of Schenck in evidence, as well as the testimony of those upon whom these monies were spent, showed these expenditures to be almost entirely of a personal nature[2] No substantial

[2] See *e. g.*, Gibney's analysis (R. 934–958); testimony of and concerning persons upon whom monies were spent (R. 514, 515, 517, 522, 531–532); testimony of Harpo Marx (R. 221 ff.), Chico Marx (R. 236 ff.), Grace Poggi (R. 385 ff.), Audrey Sutherland (R. 402 ff.), Janice Pierce

credible evidence was adduced by the defendants to support their contentions that Schenck entertained lavishly for the benefit of his business interests, and the evidence disclosed rather that Schenck's entertaining was closely confined to his relatives and intimate friends, including gambling and women companions (see footnote 2, *supra*, p. 4). Furthermore, his contract of employment provided for his reimbursement for traveling and living expenses while away from home (Ex. 90, Par. 6, R. 2773), and he was reimbursed generally for any expenses which he incurred, even remotely, on behalf of the film corporation (R. 136–143, 375–378, 527–530).

The true nature of the expenditures was known to petitioner, for not only was he intimately acquainted with Schenck's affairs, but the vouchers maintained both in Los Angeles and in New York showed the minute details of almost all transactions (see excerpts from Exs. 7, 8, 9, 78, 79, 80, R. 3095–3334), and the weekly reports which petitioner received from those in charge of the Los Angeles books transcribed the details which appeared on the face of the vouchers (Exs. 10, 11, 12, R. 1939–2500).

The court below held that the case was fairly tried and correctly submitted to the jury (R. 3630).

(R. 408 ff.), Jacob Paley (R. 411 ff.), and Lou Wertheimer (R. 480 ff.); as well as excerpts from vouchers and attached memoranda (Exs. 7–9, 78–80; R. 3114–3126, 3130–3149, 3160–3169, 3181–3205, 3238–3247, 3260–3262, 3278–3280, 3331–3334).

ARGUMENT

I

No reversible error was committed in the admission in evidence of Government's Exhibit 148 (R. 934, 2881–2882). Inasmuch as this exhibit was no more than a representation in tabular or chart form of a portion of the testimony given by the computer Gibney, the Government assumes that the objections of the petitioner are directed rather toward the testimony given by Gibney than toward the incorporation of that testimony in Exhibit 148. The propriety of using a chart merely for the convenience of the jury, which was instructed that the original exhibits were to control (R. 903), is well established. *United States* v. *Mortimer*, 118 F. (2d) 266, 269–270 (C. C. A. 2), certiorari denied, 314 U. S. 616; *United States* v. *Park Avenue Pharmacy*, 56 F. (2d) 753, 756 (C. C. A. 2).

Petitioner, in contending that Gibney's testimony, if regarded as the reply to a hypothetical question, is in conflict with *United States* v. *Johnson*, 123 F. (2d) 111, 127–128, 142 (C. C. A. 7), certiorari granted, February 2, 1942, Nos. 799–800, this Term (Pet. 15–16, Br. 23–35), seems to have misconceived the basis upon which this testimony was elicited by the Government. Gibney's testimony was, first, an accountant's breakdown of the tax returns and schedules prepared by the defendants,

and second, a computation of the amount of tax which would be due if certain items selected by the United States Attorney were included or excluded (R. 900–903, 986, 999–1005, 1054–1063, 1075–1078). It is this second portion only of his testimony which the Government offered as the response to a hypothetical question. The witness Gibney was asked to assume the inclusion or exclusion of certain items, and then as an expert in the computation of income taxes, he was asked to state what the tax would be. The assumptions of the hypothetical question were merely the inclusion and exclusion of items. These assumptions were explained to the jury in detail by having the witness Gibney break down the total figures appearing on Exhibit 148, representing the totals of categories included or excluded in the exhibit, and point out to the jury just what items went into the composite totals. No discretion was left to Gibney to include or exclude any item, but as was repeatedly pointed out to the jury (R. 900, 904, 986), the inclusion or exclusion was directed by the United States Attorney. The only function left to Gibney was to compute the tax on the basis of the figures adjusted by the inclusion and exclusion of the various items.

The assumptions of the hypothetical question rested simply on the facts of the making of certain payments by Schenck, as to which there was

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entirely adequate foundation in the record, and indeed no dispute at the trial. (See footnote 2, *supra,* p. 4; R. 1161.) The character of these payments for tax purposes as deductible business expenses or nondeductible personal expenses was the ultimate question for the jury and the weight of the evidence as to this does not enter into the question of the propriety of a hypothetical question limited as here to a mere mathematical computation of a tax.

The *Johnson* case, *supra,* relied upon by petitioner, is distinguishable, as was recognized by the court below (R. 3628–3629). In that case the decision of the Circuit Court of Appeals proceeded on the *form* of the general hypothetical question asked. This is shown by the decision of the same court in the later related case of *United States* v. *Skidmore,* 123 F. (2d) 604, 609, certiorari denied, February 2, 1942, No. 813, this Term. Here the direct examination of the accountant was in different form and included the most minute description of the basis for the witness' conclusion as to the tax due prior to the expression of that conclusion.

II

Petitioner asserts that the trial court erred in refusing to grant the request for additional instructions limiting the issue as to 1936 to deductible expenses (Pet. 16, Br. 25). It is argued that such

further instructions were necessary to prevent the jury from being confused as to the probative significance of certain evidence concerning gambling income (Pet. 6–7). Petitioner states that on this issue the Circuit Court of Appeals "held that the petitioner had the burden to show affirmatively that the jury actually 'was confused' and disregarded the established rule of law that where there is a 'fair possibility' that the jury may have been misled reversible error has been committed" (Br. 25).

We find no such holding in the opinion of the Circuit Court of Appeals. On the contrary, that court held that it is not reasonable to believe that the jury could have been confused on the issue. Specifically, the Circuit Court of Appeals said (R. 362–3626):

> The contention that the jury was confused as to the crime charged in the second count cannot be maintained. The jury was informed at the outset that the charge as to the 1936 return was the fraudulent assertion that Schenck had deductible expenses authorized by law in excess of about $40,000. The instruction as to failure to report income derived from gambling transactions cannot reasonably be read as referring to the second count. It plainly related to the third count, which charged the receipt of $100,000 more income than was reported.

There is no substance to petitioner's argument that the court below applied an erroneous standard, and none of the cases cited is in point.

III

The third reason assigned for the granting of certiorari is the contention that petitioner was denied a fair trial because of certain other instructions given or refused. (Pet. 16–17; Br. 26–36).

(a) One of the elements of the crime, the petitioner contends, is the existence of a deficiency in tax over and above the amount which the taxpayer paid. The trial court gave two separate instructions (R. 1827, 1836) which completely accord with that contention. However, with respect to the third count of the indictment, involving the year 1937 and strictly confined to that count the court charged that an overpayment of tax for the year 1937 would not relieve of criminal liability (R. 1838). Petitioner contends that he was prejudiced by the latter charge.

The statute makes no reference to the requirement of a deficiency in tax, providing simply that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title" shall be guilty of a crime. Although there is basis for the view that the existence of a deficiency in tax is not properly an element of the crime and that the charge with respect to the third count is correct, there is no need to discuss that question here since it is clear that petitioner was not prejudiced.

The emphatic manner in which the trial court limited the charge under attack to the year 1937[3] disposes of any possibility of confusion on the part of the jury and makes it inconceivable that any harm could have resulted to petitioner. The court had good reason for restricting the criticized instruction to the third count of the indictment. Schenck's return for 1937 reported $456,969.68 as taxable dividends from Twentieth Century-Fox Film Corporation. At the trial it was contended that the dividends were not taxable because they represented a rteurn of capital, and that there was therefore no deficiency for 1937 (R. 1266–1304,

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[3] The part of the charge in question reads as follows (R. 1838):

"With respect to the defendant Schenck's income tax return for the year 1937, there has been certain testimony adduced which the defendants contend tends to prove that there was an overpayment of the taxes due for that year. The defendants call your attention specifically to the dividend on the stock of Twenty Century-Fox Film Corporation, which they contend was a capital distribution rather than a distribution of income. In determining whether the defendants Schenck and Moskowitz or either of them have been guilty of a wilful and knowing attempt to evade and defeat the payment of taxes imposed for the year 1937, I charge you that the mere fact that the defendant Schenck may have overpaid his income tax for the year 1937 does not excuse either him or the defendant Moskowitz from criminal liability if you find that there was some net taxable income for the year 1937 and that the defendant Schenck or the defendant Moskowitz or both of them wilfully and knowingly attempted to evade the tax imposed on that income."

1363–1453, 1790–1799). In these circumstances, the trial court had an obvious reason to limit the instruction in question to the year 1937, as the court indicated by specific reference to the dividend controversy. No similar issue was presented by the evidence as to the year 1936 (*Infra*, pp. 12–13).

The decision of the court below is not in any way in conflict with the cases cited by the petitioner. In *Mills* v. *United States*, 164 U. S. 644, this Court held that an erroneous instruction was not harmless merely because the correct rule was laid down in another portion of the charge. It does not appear, however, that there was more than one count; so both charges were applicable to the identical crime. The same situation was presented in *Kuhn* v. *United States*, 42 F. (2d) 210 (C. C. A. 3), and *Nicola* v. *United States*, 72 F. (2d) 780 (C. C. A. 3). In *Graves* v. *United States*, 165 U. S. 323, the counts to which the erroneous instruction applied and other counts were mutually dependent. In these circumstances, the erroneous charge necessarily had a prejudicial effect on the other counts to which the charge was not directly applicable. In the present case, the three counts were not interdependent and the charge as to the third count did not affect the second count, as to which alone there was a conviction.

(b) The trial court failed to instruct, as petitioner requested, that the taxpayer was entitled to a proper deduction, even if not claimed on the re-

turn, and that this rule must be taken into consideration in determining whether there was in fact any tax due over and above the tax paid (R. 1862).

As the request shows, the allowance of deductions not claimed on the return is important only in considering whether there was a deficiency. If the deductions not claimed were not large enough to wipe out the deficiency then the error, if any, in refusing the charge was harmless. Such was the case here, as the unclaimed deductions were either not allowable or inconsequential. As against more than $44,000 of deductions taken in 1936 which the evidence showed were fraudulent, petitioner in his brief in the court below (p. 29) was able to marshal only some $6,500 in identifiable items contended to be unclaimed business expenses. It is clear, therefore, that if any error was committed in failing to grant the requested instruction, such error was not prejudicial. See *Paschen* v. *United States,* 70 F. (2d) 491, 502 (C. C. A. 7).

Petitioner argues (Br. 30) that since it is not known which of the claimed deductions the jury disallowed, there is some possibility that the jury, by allowing the unclaimed deductions, might have arrived at no deficiency in tax. Such fine speculation cannot prevail in determining whether an error is prejudicial. The evidence must be viewed in the light most favorable to the Government. See *Glasser* v. *United States,* Nos. 30–32, this Term, decided January 19, 1942.

(c) Petitioner complains (Br. 30–34) that the trial court failed to give an adequate instruction on the nature of "ordinary and necessary" business expenses. A full paragraph of the charge was devoted to the definition of those terms and the instruction was given in plain, simple terms which the jury could easily understand (R. 1841). Petitioner's argument that error was committed because the charge did not repeat in detail the several definitions which were requested is groundless. Although the trial court's language was general, it fully covered the subject.

(d) On the subject of estimated business expenses, the jury was charged that a taxpayer may estimate such expenses only when he lacks information from which he can make an accurate allocation between personal and business expenditures (R. 1842–1843). This rule is in accord with the decision in *Cohan* v. *Commissioner,* 39 F. (2d) 540 (C. C. A. 2), and the petitioner has cited no case to the contrary. The argument that the taxpayer should be allowed to ignore available detailed information, as petitioner did, in deducting business expenses, requires no comment. Moreover, as the court below aptly pointed out, petitioner, in estimating, made "no effort to approximate accuracy" (R. 3624). Further, as to the criminality of the claimed deductions the trial court correctly

charged that the jury must consider whether the defendants acted with fraudulent intent (R. 1843).[4]

IV

The prohibition of testimony by Revenue Agent Mulligan did not constitute reversible error and provides no reason for the granting of certiorari. At the outset of their case petitioner and his co-defendant Schenck called to the stand, one after another, four Internal Revenue Agents: Mulligan, Colin, Jacobs and Yarmis (R. 1245, 1255, 1259, 1265). The record shows that Revenue Agent Mulligan never had anything to do with Schenck's tax returns, but had made an investigation of the 1937 return of Twentieth Century-Fox Film Corporation (Ex. 169 for identification, R. 2920). The information sought to be obtained from him, all within the knowledge of the defendants and available through other witnesses, concerned only their defense to the third count, that certain 1937 dividends reported by Schenck as taxable income were not taxable (R. 1251–1253; Ex. 169 for identification, R. 2920). The court excluded Mulligan's testimony because there had not been obtained, pursuant to a Treasury regulation, the permission of that Department for him to

[4] The contention that the jury was not sufficiently advised that Schenck might deduct entertainment expenses for business purposes at his home is baseless. See opinion, below, R. 3625, and the charge to the jury, R. 1841.

testify (R. 1252–1253; see also Defendants' Ex. A–43, R. 3078).

The information sought to be obtained from the witnesses Colin, Jacobs and Yarmis was of a different nature from that sought from Mulligan. Agent Colin was interrogated as to possible practices of the Treasury Department in estimating amounts to be allowed to taxpayers generally as deductions for business and entertainment expenses (R. 1254). The Government objected that such testimony would be immaterial, inasmuch as a practice of the Treasury Department in such regard, even if it existed, could not change the law (R. 1255). It was further objected that such testimony was out of order, and without proper foundation, because there had not yet been any evidence that a practice in that regard was known to the defendants or relied upon by them or even whether the defendants had computed deductions on an estimate basis (R. 1255–1259). The objection as to the order of proof was sustained by the court and the testimony of Agent Colin excluded at that time (R. 1258–1259). The court below found this ruling to be free from error, the order of proof being a matter over which the trial court has discretion. *Thiede* v. *Utah Territory,* 159 U. S. 510, 519.

The questioning of Agents Jacobs and Yarmis followed generally the lines of the questions put to Agent Colin, the emphasis being directed more,

however, to examination of tax returns of the defendant Schenck for years prior to those named in the indictment (R. 1259, 1264–1265, 1265–1266). Again the Government objected that the testimony was out of order, and that evidence as to returns for prior years was not relevant without a showing that the circumstances were the same and would prove no more than that the Government failed to pierce the fraud (R. 1260–1264; 1266). *Guzik* v. *United States,* 54 F. (2d) 618, 619 (C. C. A. 7), certiorari denied, 285 U. S. 545. The trial court excluded the testimony, again on the ground that it was out of the proper order of proof (R. 1259–1266).

Concerning the exclusion of Agent Mulligan's testimony, the court below held correctly that no constitutional question is presented for an appellate court to decide, for the only evidence which the petitioner sought to elicit dealt with the issues in the third count of the indictment, as to which there was an acquittal (R. 3630). Therefore, no prejudice could have resulted to petitioner. It is now argued (Pet. 12) that the trial court committed reversible error in excluding Mulligan's testimony because petitioner's counsel intended to inquire of this witness concerning any practice of the Treasury Department with respect to estimating amounts to be allowed as deductions for business and entertainment expenses. No such offer of proof was made or even intimated.

The ruling of the court below on this point presents no conflict with *McCandless* v. *United States,* 298 U. S. 342. The latter case held that where a general offer of a class of evidence is made and rejected, it is not necessary to make a more specific offer in order to raise on appeal the question of the admissibility of evidence falling within that class. The instant case is altogether distinguishable, for as to the witness Mulligan there was no offer of the class of evidence which the petitioner now contends was sought to be elicited.

V

The charge on character evidence (R. 1829–1830) was fair and proper and does not conflict with the decision of this Court in *Edgington* v. *United States,* 164 U. S. 361. Any confusion which has arisen as to the *Edgington* decision deals with a question not raised by petitioner.[5] See *Nash* v. *United States,* 54 F. (2d) 1006, 1007 (C. C. A. 2), certiorari denied, 285 U. S. 556.

Quercia v. *United States,* 289 U. S. 466, cited by petitioner (Br. 38), is obviously not in point.

CONCLUSION

The decision below is correct. There is presented neither an important question of law nor

[5] See discussion in the Government's briefs in opposition to two petitions for writs of certiorari recently denied by this Court: *Feinberg* v. *United States,* No. 807, present Term (pp. 13–14); *Boehm* v. *United States,* No. 810, present Term (pp. 14–16); certiorari denied in both cases, February 2, 1942.

a conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

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